

**Date:** March 18, 2014

**To:** Thomas J. Bonfield, City Manager  
**Through:** W. Bowman Ferguson, Deputy City Manager  
**From:** Joel V. Reitzer, General Services Director  
**Subject:** Building and Services Agreement Between the City of Durham and The Carolina Theatre of Durham, Inc.

### **Executive Summary**

The Carolina Theatre of Durham, Inc. provides a variety of arts programs open to and for the benefit of the arts community and general public and operates the facility owned by the City of Durham at 309 West Morgan Street. The City and County of Durham funded the renovations and restoration of The Carolina Theatre, for the purpose of the revitalization of the downtown area by developing interest and support for cultural arts in the City and preserving, restoring and maintaining the building as a historical, premier, professional quality cultural arts center.

The current lease extension of the Agreement by and between the City and The Carolina Theatre of Durham, Inc. (CTD) to program and operate the facility expires upon the making of a new Agreement. The City and CTD have negotiated a new Building and Services Agreement, with the option of two renewals. The new Agreement provides for the term, cost and benefits to the City.

### **Recommendation**

The General Services Department recommends that City Council authorize the City Manager to enter into an Agreement with The Carolina Theatre of Durham, Inc. from the date of its making, being the date appearing in the first paragraph of the Agreement, through June 30, 2024, for programs and to operate the facility; and authorize the City Manager the right to extend the Contract upon the same terms and conditions for a period equal to two five year extensions. Such extensions of the Agreement may be at any point where extensions are authorized by agreement of both parties.

### **Background**

The Carolina Theatre of Durham, Inc. is a 501 (c) (3) non-profit organization with a mission to serve greater Durham and the Triangle region with vibrant, thought-provoking programs of the performing and cinematic arts. The organization carries out its mission through its operation and management of the Carolina Theatre and its undertaking of the following programs: live events programming, film programming, facility rentals and concessions. Both the City and CTD are cooperating through this agreement to support programming and operations of the performing arts, with the goal of achieving a self-sustaining status.

CTD provided professional management, programming and operation of the Carolina Theatre via a 10 year Management Agreement from July 1, 1998 through June 30, 2008. The Management Agreement was extended from July 1, 2008 through June 30, 2013. It was extended again July 1, 2013 to complete the development of a new Building and Services Agreement. The Agreement includes fee and payment terms, use of premises, facility operation and maintenance, programming services, financial reporting requirements and performance measures.

The City desires to provide for the professional management, programming, and operation of the Carolina Theatre to ensure it is managed and operated for the long term benefit of the City and the general public. The City and CTD have determined that this Agreement will enhance the ability of CTD to provide a variety of cultural arts programs open to and for the benefit of the arts community and general public. The City desires to have CTD manage, operate, occupy, and program the Carolina Theatre, and CTD desires to perform such services for the City on mutually agreed upon terms and conditions.

### **Issues/Analysis**

The City and CTD have come to agreement on the amended terms for the Building and Services Agreement. The key provisions of the Building and Services Agreement are described below:

- Term of Agreement
  - The term of the Agreement extends from the date of its making through June 30, 2024. There is the option, upon agreement of both parties for two five year renewals.
- Fee and Payment Terms
  - The base fee, beginning in FY 15, is \$635,000.00.
  - The payment terms will be as follows:
    - 50% to be paid July 15
    - 25% to be paid January 15
    - 25% to be paid April 1
- Annual Fee Adjustment
  - An annual fee adjustment of 2.5%-3% as a limiting add or deduct shall apply as a maximum adjustment
  - The City will determine whether the fee will increase or decrease, based upon contract performance, including performance on performance measures and/or the City's overall budget requirements
  - Fee adjustment for Facility Maintenance and Operations (staffing, security, building upkeep, cleaning, etc.) does not change unless there are significant and required cost increases
  - City may reward the CTD for conservation efforts
  - Payment for Facility Maintenance is contingent upon adherence to the Facility Maintenance Plan, as reviewed quarterly by the City. This Agreement anticipates a two year phase-in period to complete adherence to the Facility Maintenance Plan.

- Payment for support of public programs will not change for the term of the agreement unless there is an expansion or reduction in arts programs, as mutually agreed upon between the City and CTD
  - Should the City succeed in raising funds for the Carolina Theatre's support through third parties, the City may, at its discretion, reduce its direct support under this agreement in similar measure. CTD Board of Trustees shall inform the City Manager if it believes that accepting such third party funding would be in conflict with its mission or that accepting such funding would in other ways pose a material threat to its mission or sustainability.
- Use of Premises
  - CTD agrees to use the Property principally and primarily for the purpose of providing a variety of performing and cinematic arts programs open to and for the benefit and enjoyment of the general public
- Facility Maintenance
  - General Services has developed a Facility Maintenance Plan (FMP) for CTD that is incorporated into the Agreement, as a requirement that is to be followed for maintenance activities
  - CTD shall be responsible for the preventive maintenance tasks described in the FMP
  - The City shall be responsible for warranties, roof and building envelope, and mechanical and electrical systems integrity
  - CTD shall be responsible for all other maintenance and repairs
  - City may reward CTD for conservation efforts
  - City shall provide quarterly review (at minimum) of adherence to the FMP
- Annual Audit
  - An annual audit is required, but paid for by CTD
- Performance Measures
  - Developed by CTD and approved by the City with progress to be reviewed by the City semi-annually. The outcomes measured are: increased participation, satisfied and loyal customers, connected to the community, efficient operations, financial sustainability and marketing.
  - Examples of Performance Measures include:
    - % of profitable presentations
    - Total Usage Days, Fletcher Hall
    - Satisfaction Survey Rating
    - % of Memberships Renewed
    - % of Durham Public School students participating
    - Earned Revenue Growth
    - % of Costs Recovery-Film Program
    - % of Costs Recovery-Live Events
    - Deficit Reduction
    - Economic Impact
- Building Use by City
  - CTD shall make space available to the City at the Carolina Theatre at no charge to the City for space, tables or chairs
- Exclusivity
  - CTD's services shall be non-exclusive to the Carolina Theatre. CTD shall, without limitation, be permitted to engage other facilities or organizations in

- Durham and in other cities to provide services, including consulting, booking, marketing, operations, or other services as needed.
  - City of Durham funds will not be used for any project, facility, or partnership other than the operation of the Carolina Theatre.

### **Alternatives**

If the agreement is allowed to expire, there would be no contracted facility operator, and in such circumstance, the City would assume operational responsibilities, or close the building. The Administration does not advise choosing this alternative.

### **Financial Impact**

To date, CTD has been paid \$460,890.00 of their annual fee for this fiscal year, equal to 75.0% of the total FY 14 appropriation for the CTD of \$614,520.00. The new Agreement (that spans eleven fiscal years) pays the CTD an additional \$153,630.00 in April 2014. Funds in the amount stated above for the second half of FY 14 were already included in the FY14 budget for this purpose (0Z330404 728803).

The fee that will be requested in the FY 15 budget for the CTD is \$635,000.00, which will serve as the base amount for subsequent fiscal years. Over the initial duration of the contract, the maximum amount to be paid to the CTD is not to exceed \$7,433,193.39. The city would make funds available in this Agreement as follows:

Maximum Payments Over Eleven Fiscal Years	Potential 3% Maximum Annual Increase
14	\$153,630.00
15	\$635,000.00
16	\$654,050.00
17	\$673,671.50
18	\$693,881.65
19	\$714,698.10
20	\$736,139.03
21	\$758,223.21
22	\$780,969.91
23	\$804,399.01
24	\$828,530.98
Total Contract Maximum Cost	\$7,433,193.39

Minimum Payments Over Eleven Fiscal Years	Potential 3% Maximum Annual Decrease
14	\$153,630
15	\$635,000.00
16	\$615,950.00
17	\$597,471.50
18	\$579,547.36
19	\$562,160.94
20	\$545,296.11
21	\$528,937.23
22	\$513,069.11
23	\$497,677.04
24	\$482,746.73
Total Contract Minimum Cost	\$5,711,486.02

Payment terms shall be as follows: 50% to be paid July 15, 25 % to be paid January 15 and the remaining 25% to be paid April 1 of each fiscal year.

The City will no longer bear the costs of routine maintenance and repairs above a specified threshold of expense by the CTD, as in the prior management agreement. CTD will pay these costs, including those associated with implementation of the Facilities Maintenance Plan.

#### **SDBE Summary**

The item was not reviewed by the Department of Equal Opportunity/Equity Assurance for compliance with the Ordinance to Promote Equal Business Opportunities in City Contracting.

Attachments: The Carolina Theatre of Durham, Inc. Building and Services Agreement

Exhibit A: Facility Maintenance Plan Table of Contents and Inspections Checklists

Exhibit B: CTD Performance Measures

Exhibit C: Fixtures, Furnishings and Equipment Owned by the Carolina Theatre, Inc.

Exhibit D: City Owned Fixtures, Furnishings +Equipment

Exhibit E: Insurance Certificates and Privilege License